



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
Criminal Appeal 186 of 2007
JAMES OMONDI OTIENO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[From original conviction and sentence in criminal case number 841 of 2006 of the Principal Magistrate's court at Kisumu].

Coram

Karanja, Aroni - JJ
Mr. Gumo for state
Court clerk Laban/George
Appellant in person

J U D G M E N T

The appellant , **James Omondi Otieno alias Abdalla**, appeared before the Principal Magistrate at Kisumu charged with the offence of robbery with violence contrary to section 296 (2) of the penal code, in that on the 5th October 2006 at Milimani Estate Kisumu jointly with another not before court while armed dangerous weapons namely pangas, robbed **Susan Aruwa Akumu** of one umbrella, one bag, one mobile phone make Nokia 1100, one bible, a loaf of bread, tomatoes and assorted personal documents all valued at Kshs. 6,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Susan Aruwa Akumu.

After pleading not guilty to the charge, the appellant was tried, convicted and sentenced to suffer death. However, being dissatisfied with the conviction and sentence he has preferred the present appeal on the basis of the grounds contained in his petition on memorandum of appeal filed herein on 27th November 2007.

The grounds are basically a complaint on the insufficiency of the prosecution evidence of PW2 and PW3. There is also a complainant that the case being one based on identification, an identification parade was not conducted and that the investigating officer was not called to testify.

At the hearing of the appeal, the appellant presented and relied on written submissions which we have carefully considered.

Mr. Gumo, the learned Assistant Deputy Public Prosecutor, appeared for the respondent and opposed the appeal and submitted that the appellant was in the company of others at the time of the offence and was apprehended immediately after alarm was raised by the complainant. That the offence did not occur in total darkness as there were security lights nearby and that the complainant had ample time to see and recognize her attackers.

The learned State Counsel further submitted that PW2 and PW3 responded to the complainant's alarm, gave chase and managed to apprehend the appellant who was found with some of the complainant's stolen items.

The learned state counsel contended that the appellant's conviction was safe and therefore this appeal ought to be disallowed.

Having considered the submissions by both the appellant and the respondent, we are obliged to reconsider the evidence and draw our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

Briefly, the prosecution case was that on the material date at about 7.00 p.m. the complainant **Susan Akinyi Aruwa (PW1)**, an employee of the Ministry of Agriculture was walking towards Nyalenda at about

7.00 p.m. She was carrying an umbrella and a paper bag containing foodstuff. In the process, she was held from the back by a young man holding a panga (machete) against her neck. The young man told her that he had been sent to kill her. She saw the young man as it was not very dark and there were security lights at the gates of nearby houses. She was very close to the young man as she talked to him. As they walked together two other people came towards them. The young man then raised his panga and threatened to cut the complainant. She raised alarm after the young man snatched her bag and everything she was carrying and took off. Some security guards responded and pursued the young man and his accomplices. The young man was apprehended by the security guards and identified by the complainant as the appellant herein. Some of the complaint's stolen property were recovered after the appellant's apprehension.

Jeremiah Ochieng Omondi (PW2), was on duty as a security guard on that material date at about 7.00 p.m. he was in a security alarm vehicle with his colleagues along Tom Mboya drive Milimani estate when they heard shouts of thief, thief. He (PW2) saw a person carrying a panga and threatening to cut another security guard. The person was running towards Ring Road but was pursued by the security guards. He was apprehended and found in possession of a bag, umbrella and paper bag. He was identified as the appellant. Members of the public appeared at the scene and wanted to lynch him. He was taken to the offices of the security guards before being handed over to the police.

Mathews Otieno Wanyama (PW3) was also a security guard and was on duty on the material date and time at a hostel called Tich when he heard screams and saw two young men running away holding a paper bag. He also pursued the young man but on the way one of them produced a panga. He was the one carrying the bag. He attempted to cut the guard (PW3) who received reinforcement from other guards. They apprehended and disarmed the young man who was the

appellant. He was found in possession of property stolen from the complainant.

After his apprehension, the appellant was handed to **PC Stephen Busureri (PW4)** of Kisumu Police Station who investigated the case and later charged him.

In his defence, the appellant in an unsworn statement denied the offence and stated that he was a hawker and was coming from work on the material date and time carrying a carton containing goods. He arrived at the hostel called Tich and saw a group of people among them a woman who identified him.

He was apprehended by members of the public and taken to the offices of Bedrock Security guards where the alleged recovered items were “planted” on him. He was thereafter taken to the police station and charged.

Considering all the foregoing evidence in the light of the grounds of appeal and the submissions by both the appellant and the learned Assistant Deputy Public Prosecutor, we would find that the ingredients of the offence of robbery with violence under section 296 (2) of the penal code were sufficiently established by the complainant’s evidence. She was initially confronted by the appellant who was later joined by two accomplices after which the complainant’s property were stolen amid threats of violence against her. The appellant was at the time in possession of a panga.

We would also find that the appellant was linked to the offence by being positively identified by the complainant and by being found in very recent possession of the complainant’s stolen property.

The complainant’s evidence on identification was reliable as circumstances were favourable for visual identification at the scene of the offence. The complainant stated that at the time she was confronted by the appellant she was walking near some houses which had security lights at the gates. She also said that it was not very dark and that she was close to the appellant as she talked to him asking

what was wrong.

This evidence of identification of the appellant was corroborated by the evidence of the recovery of the complainant's stolen items from the appellant by the security guards (PW2 and PW3).

The two security guards responded to the alarms raised by the complainant after she was robbed. They pursued the suspects and apprehended the appellant immediately thereafter. He was found in possession of the items which had been stolen from the complainant. The complainant positively identified the said items.

So, even if we are to disregard the complainant's evidence of identification, there was still credible circumstantial evidence against the appellant based on the doctrine of recent possession. In the circumstances, we do not think that his defence amounted to much. It was effectively rebutted by the evidence of the complainant and the two security guards.

Although the appellant contended herein that the evidence of the complainant and the security guard was not reliable on account of contradictory statement, we would find that if there were any contradictions in the evidence the same were not material as to impact positively in favour of the appellant. May we also point out that after the appellant was handed over to the police, the case was investigated by PC Busureri (PW4). The appellant's allegation that the case was not investigated and/or that the investigating officer was not called to testify was not true.

In sum, we see not good reason to prevail upon us to interfere with the conviction and sentence of the appellant by the learned trial magistrate.

This appeal must therefore fail and is hereby dismissed.

Delivered, dated and signed at Kisumu this 4th day of May 2010

J.R. KARANJA
JUDGE

A.A. ARONI
JUDGE